

57). As ancient deeds after thirty years prove themselves, the law presuming that the attesting witnesses are dead, so here the lapse of far more than a generation creates like presumption that all competent witnesses are dead, especially with respect to land which in 1850 was in the wilderness. This aside, however, the position of plaintiff in error was and is that *adjudication* of this land as swamp by the Secretary of the Interior in 1853 dispensed with all tender of proof to establish *de novo* its swamp character.

VII.

The land here in controversy had been surveyed by the United States in 1839. The plat thereof and field-notes were of record and unchallenged, and by that survey the United States had sold a large acreage in the township prior to the swamp-land grant of 1850. Following that grant, and the election of the State to take by the field-notes of survey, the United States Surveyor-General, in execution of his instructions, found from the field-notes thereof that *this land* was returned as swamp and overflowed, and he accordingly embraced same in a list of such lands transmitted to the Land Department at Washington, March 31, 1852. (Rec. 24.) Thereupon this land, with others, was embraced within Ionia List No. 1, which was approved by the Secretary of the Interior to the State October 27, 1853 (Rec. 37-39), the approval of the Secretary on said date reading thus :

“The lands embraced in the foregoing list are hereby approved to the State of Michigan under the Act of Congress app'd 28 September, 1850, subject to any valid legal claim that may exist thereto.”

January 13, 1854, certified copy of this approved list was transmitted to the Governor of Michigan (Rec. 36), and thereon, January 31, 1854 (Rec. 37), the Governor performed the duty imposed upon him under the grant by acknowledging the receipt of such approved list, and requesting the issuance of patent thereon. *That request for patent has never been withdrawn, modified, or rescinded by the State.*

The plat of the lands thus approved, which the granting Act required should accompany the "accurate list to be transmitted by the Secretary of the Interior to the Governor of the State," and which embraced the land in contest, was forwarded to the Governor from the Interior Department on March 13, 1854 (Rec. 26). The plat embracing this land appears in the record preceding page 47.

The Governor's request for patent covering this land has not been complied with, notwithstanding the positive direction therefor made by the granting act; and omission thereof gives rise to this case.

VIII.

Plaintiff in error, through its grantor Sparrow, has received patent from the State of Michigan for this land. (Rec. 53-55.)

IX.

Omission to thus patent the land to the State stands, as defendants in error claim, upon the premise that the original survey of the township made in 1839 was reported in 1849 as fraudulent, resulting in the resurvey thereof in 1856, and a new list of swamp land made therefrom and approved in 1866, which omitted the tracts here in controversy, but which defendant in error claims superseded

and annulled the former list transmitted and approved in 1852-'53 *supra*, and as a consequence therefrom destroys all title or claim of the State herein.

X.

Premising that, with respect to these tracts, there was never proven fraud or error in the original survey thereof, but judicial record establishing the contrary, it appears :

February 1, 1842, the Legislature of the State of Michigan, by joint resolution (Rec. 64), requested the United States to "cause the survey of certain townships " of land." This resolution *named* eighty-one described townships (which did not include the land here in controversy) which had either not been surveyed or so imperfectly done as to render the survey valueless. This resolution caused Executive investigation, resulting in resurvey as found necessary, all of which work was done and fully completed before 1850, except three of such townships which were never resurveyed. This resolution covers the *whole* of the State's connection with the work of resurvey. Her action was *pro bono publico*, taken long prior to the swamp-land grant, and, therefore, has no effect thereupon. But upon this initiative public land surveyors were sent into the field and continued examination of alleged defective or fraudulent work until large sums were appropriated and expended for such resurveys throughout a large portion of Michigan. This was continued with resulting profit to deputy land surveyors until the work was summarily stopped by Commissioner Hendricks in 1857. (Rec. 253-259.)

XI.

The power of the Land Department to correct surveys is not here challenged, nor is the State or her grantees

justly subject to the charge that it or they seek to assert a title to the land in controversy based upon a fraudulent and non-existing survey. *Contra:*

First. The original survey of 1839 continued to be recognized until 1858, and the lands in this township were sold and disposed of by the United States according to that survey for nearly twenty years. Manifestly, no resurveys could by alteration of lines or otherwise affect or destroy rights thus vested. The instructions for these resurveys carefully recognized this proposition (Rec. 74-75). *If*, therefore, the original survey was in fact made (which abundantly appears from this record) and the State not only elected to receive these lands thereunder, but same were in fact approved to her as swamp thereby, one of the fundamental grounds on which her title is here rested is that such designation and approval vested the title in the State hereto under the swamp grant, leaving the United States officials thereafter without power to ignore the vested right of the State or to change the description or character of the land here involved by any resurvey.

Second. The allegations of fraud and error with respect to these original surveys involved the running and location of the *lines of survey* and not the incidental description of the character of land which, under the surveying instructions, the deputies were required to report. In other words, the whole controversy with respect to these original and resurveys in Michigan has been primarily upon the alleged failure either to run such lines at all or the erroneous and defective running thereof. The character of the land as swamp or dry has not been the subject-matter of dispute. As the whole matter arose and was largely concluded prior to the swamp-land grant, the character of land in 1850 as designated by the original

survey was not a matter wherein the State or any other party could have been interested to induce fraudulent or false returns.

Third. Township 18 N., R. 3 W. (in which the land here in controversy lies), was surveyed by Deputy Henry Nicholson in 1839. The *only* charge of fraud or error against this survey appears in the report of Deputy-Surveyor Burt, who examined this township with many others in 1849, and who reports (Rec. 95) that the work therein was "bad throughout." Upon this report suit was brought in 1849 by the United States against Nicholson and his bondsmen in the United States Circuit Court for Michigan, to recover the liquidated damages named in the bond, and on the allegation that Nicholson had not performed his work. The substantial plea was performance, and upon trial resulted in verdict for the defendants. The record of this suit was offered in evidence here, ruled out by the trial court, and such ruling is assigned for error. (Rec. 260-264.) There was also offered in evidence and rejected the like record of a similar suit brought at the same time against Deputy Henry Brevoort, Jr., who had made survey in the same region, and on which like plea of performance with resulting verdict in favor of the defendant appears. (Rec. 264-270.)

Fourth. Comparison of the old and new surveys establishes *complete* and corresponding identification of these lands in controversy here by the lines and description of both the original and resurveys. It must be remembered that the original survey was made in 1839—the resurvey in 1856. During the intervening seventeen years the character of the land would necessarily undergo change. Forest fires would obliterate old survey corners, would destroy timber, and thereby drain by natural effect marsh woodland. Destruction of beaver dams would drain many

tracts flooded by the backing of the waters. The survey of 1839 had been made in the spring or wet season; the survey of 1856 was made in the fall or early winter or dry season. *Yet* the field-notes of the resurvey *demonstrate* that this land was, in fact, surveyed in 1839, precisely as the jury found in the action brought by the United States *supra*.

To illustrate:

The S.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ Sec. 20 is one of the tracts here involved. The survey of the line between Sections 20 and 21 and 20 and 29 would determine the character of that forty. The field-notes of the old survey (Rec. 43-44) disclose that in running the line north, between Sections 28 and 29, the surveyor left the section corner in a swamp which extends north on the line between Sections 20 and 21, and along the entire *east* side of this forty. The resurvey of this *same* line discloses two swamps on the same east line of this forty, and extending its whole length, the swamps being separated by a narrow ridge of a few feet in width. Manifestly, seventeen years naturally and easily accounted for this slight change. By the survey of 1839 this forty was certified to the State; by the resurvey it is held *dry*, although swamp land is reported by the resurvey on a large part of the *southern* line of the forty—thus, by the resurvey, enclosing it on two sides as swamp.

By the survey of 1839 the N.W. of S.W. Sec. 21 (in controversy here) is reported swamp, and the tract was so certified to the State in 1853. The character of this land is disclosed by the field-notes of the line between Sections 21 and 28 as wholly swamp (Rec. 40). The field-notes of resurvey (Rec. 160) show part only of this line as swamp, and again as intersected by a stream. That stream, in the spring of 1839, could easily have been in flood, and the survey then made truthfully report the land as swamp.

Again, the N.W. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ Sec. 22 (in controversy here) was reported as swamp by the survey of 1839, and certified to the State as such in 1853.

By the resurvey of 1856, the S.W. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ (the south adjoining forty) is reported as almost *wholly* covered by swamp, with a stream cutting its southwestern corner. Seventeen years before, this swamp could easily have existed on the N.W. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ (the forty here in suit), and forest fires and natural causes *thereafter* drained it.

The N.W. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ Sec. 28 (in controversy here) was reported as swamp by the original survey, and certified to the State as such in 1853. The same amount of swamp land in this section is reported by the resurvey of 1856, showing that the swamp had changed its location--a natural result with lapse of years and often observable.

The N. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ Sec. 35 (in controversy here) was reported as swamp by the survey of 1839, and certified to the State thereunder in 1853. *The resurvey shows a swamp extending directly across this eighty, and it is in fact swamp*, but erroneously treated by the United States Land Department as dry. In short, the resurvey completely *confirms* the original survey as to the character of this land.

By the field-notes and plat of resurvey, the old section and quarter-section corners with respect to Sections 20, 21, 22, 28, and 35, wherein the lands here in suit fall, are found and reported as follows :

Section Corners :

Between Sections 22 and 27.....	Rec. 159
Corner of Sections 14, 15, 22, and 23.....	" 161
Between Sections 21 and 22.....	" 163
Corner of Sections 21, 22, 27, and 28.....	" 165
Corner of Sections 26, 27, 34, and 35.....	" 167
Corner of Sections 25, 26, 35, and 36.....	" 168

Quarter-Section Corners :

Sections 22 and 27.....	Rec. 159
“ 22 and 23.....	“ 161
“ 15 and 22.....	“ 161
“ 21 and 22.....	“ 163
“ 35 and 36.....	“ 167
“ 26 and 35.....	“ 168

More than three thousand acres was sold and conveyed in this township by the original survey. The plat thereof was on file from 1839 until 1858, when the plat of resurvey was filed. The two plats describe the *same* corners, and there is no change in the corners between the two surveys. The Register of the United States Land Office, who was called as a witness in this case, when asked (Rec. 52),—

“ I will ask the witness if there is any difference in the “ the two surveys,” answered—

“ *No, there is not.*”

On the plat of the original survey, the entire acreage in the township is given as 23,162.14 acres, and on the plat of the resurvey as 23,340 acres. The difference is but 177.86 acres, *or far less than 1 per cent. of the entire acreage involved.* On the north and west sides of the township appear many irregular lots on both surveys, with fractional areas, yet the plat of resurvey brings the acreage at the even figure of 23,340 acres—an impossible result under such conditions ; whereas the plat of original survey brings the fractional quantity of 23,162.14 acres, a result in entire harmony with the fractional areas involved, as shown by these forty-six fractional lots which fringe the north and west side of the township on the plats of both surveys.

It thus conclusively appears that this land was in fact surveyed in 1839 (1) by the field-notes and plat of resur-

vey, and (2) by the judgment rendered against the United States in the suit brought against the original surveyor and his bondsmen. The character of the land as swamp was truthfully reported by such original survey, for corresponding swamps are found by the resurvey somewhat diminished in size, during the intervening seventeen years, from natural causes and too plain to require extended recital.

Michigan having thus adopted the field-notes of the original survey of this township, and the existence of these surveys *as a fact* being thus demonstrated, it follows under all the decisions of this Court that the identification and certification of this land to the State as swamp vested the title thereto in her as of the date of the grant. That right was vested as fully as the right of any purchaser from the United States who bought during the existence and recognition of the original survey, to wit, between 1839 and 1858. Hence, both as matter of fact and matter of law, the right of the State to *these* tracts is as clear and absolute as if they had been purchased from the United States during that period for cash or otherwise taken by individuals under the general land laws. Payment of purchase price and resulting entry in the one instance could not vest the title more effectually than a direct grant by Congress followed by identification of this land as included thereby in precise accord with the granting act.

Hence we submit as fully applicable to this case the ruling of this Court in *Cragin v. Powell* (128 U. S. 691-699), wherein the Court, in speaking of the power of supervision and correction of the public land surveys, said :

“ It is conceded that this power of supervision and correction by the Commissioner of the General Land Office “ is subject to necessary and decided limitations. Nor is “ it denied that, when the Land Department has once

“made and approved a governmental survey of public lands (the plats, maps, field-notes, and certificates all having been filed in the proper office), and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased in good faith from the Government against the interferences or appropriations of corrective surveys made by that Department subsequently to such disposition or sale.”

It should be well borne in mind that in making these resurveys the United States Land Department refrained from attempting to disturb the swamp-land title of the State where lists had been approved by the original surveys and *patented* to the State thereunder, and it is remarkable to note in this connection that these original surveys have thus stood as completely identifying the lands thus patented to the State, as well as also fully identifying all other tracts which had been sold or otherwise disposed of by the United States thereby long before these resurveys were made. Moreover, the Department at Washington was careful to distinguish between “incomplete” and “fraudulent” surveys in giving instructions for the resurveys. From this record as above recited it abundantly appears that the survey of the tracts here involved had in fact been made. The strongest presumption which can be indulged against us is that *all* the lines surrounding them had not been run, and this rests upon the evidence of a resurvey made seventeen years thereafter. Hence the strongest statement of the case against the State with respect to the matter of survey of these lands is that same fell within the class of “incomplete surveys.” But the instructions of the Department here to the Surveyor-General, given on March 8, 1852 (Rec. 112-113), and long before the resurvey of the township here in question, were as follows :

"First-class—incomplete surveys. Where a *portion* only of the lines in a township is found to have been actually surveyed, and wherein some lines have been run and some corners established, which lines and corners can now be found, that portion of such original surveys which shall have been determined to be thus available by retracing the same is to remain undisturbed, and be respected, whether there have been sales made therein or not, and the residue of such township must be surveyed as if originally, but made to connect in all particulars with the former."

The resurvey of this township was not only made under these instructions, but in entire harmony therewith, because identity of corners between the original and resurvey is established by this record and shown above. *The obvious intention* of foregoing instructions was to leave undisturbed former lines and corners, and to treat them as effective from and under the original surveys.

XII.

Foregoing answers much that is found in opposing briefs, and leaves as pertinent for reply

ACTION OF THE UNITED STATES LAND DEPARTMENT ON RESURVEYS AND ALLEGED BINDING EFFECT THEREOF UPON THE STATE.

A.

It is strongly urged against us that the Department treated the resurveys as controlling in all cases where the lands had not been *patented* to the State under the original surveys and approved lists founded thereon; that in such cases new lists were made of the swamp lands shown thereby as to each unpatented township, which in effect

superseded the original approved lists, and that the State received and accepted patents on such new lists, whereby her right to any lands excluded therefrom, but which appeared as swamp on the original approved lists, became extinct. A large mass of correspondence, instructions to surveyors-general, etc., is submitted by defendant in error to establish these contentions.

We answer :

The assertion is incorrect both in fact and law. The legal effect of an approved list made up on the original survey, and the election of the State with respect to lands actually surveyed (as here) cannot be destroyed by such unilateral action of the United States Land Department. Title created by law of Congress and identified by the action of the special tribunal to whom the duty was thus assigned, could not be thus destroyed, nor did the Federal officials then in office undertake so to do.

Contra, December 22, 1858, Commissioner Hendricks wrote the Commissioner of the State land office (Rec. 31) a letter to which we call the Court's particular attention. It informed the State Land Commissioner that these resurveys required action on the part of the State "to enable us to adjust the business with proper regard to the evidences in the case;" that selections had been reported by the surveyors-general on the original surveys, and had been approved by the Secretary of the Interior, and certified copies of the approved lists furnished the State. *But*, following such approval, the resurvey of many townships had been followed by new lists of selection, made up and transmitted by the United States Surveyor-General, which in matter of description of lands differed materially from the former approved lists; that patents for probably one-half of the townships in this condition, as thus originally selected and reported, were prepared and

transmitted prior to the Surveyor-General's transmission of these new lists in such resurveyed townships; that the balance of these original selections as thus approved had not been carried to patent, because, as the letter proceeded to *ex parte* rule, "the reports made after the re-survey are the only proper evidences upon which our action must be made in determining the grant;" that with respect to patents already issued the Department did not intend to make any alteration in the original approved lists. And transmitting a list of both the townships in which the lands had thus been patented, and those in which they had not, the letter states that such lists were forwarded "with the request that the proper authorities of the State may elect to receive the grant with reference to those townships in which the lands have not been patented, as the selections are made upon the evidences of the *resurveys*."

The State never made the election thus demanded, and, as will hereafter appear, repeatedly asked for the patenting of lands, approved under the original surveys, in such resurveyed townships which were not reported as swamp thereby.

But this letter adds the important and controlling statement that—

"It is our purpose to submit to the Secretary for a revocation of approval so much of the lists of the several land districts as embrace the tracts in the condition specified, forwarding at the same time a list of the tracts as subsequently reported for his approval."

THIS WAS NEVER DONE. FROM THE BEGINNING TO THE END OF THIS RECORD NOTHING APPEARS TO SHOW THAT THE UNITED STATES LAND DEPARTMENT EVER FORMALLY UNDERTOOK TO REVOKE THE APPROVAL OF A SINGLE LIST IN WHOLE

OR IN PART WHICH HAD BEEN MADE UP UPON THE BASIS OF THE ORIGINAL SURVEYS AND APPROVED BY THE SECRETARY OF THE INTERIOR THEREUNDER.

This record is thus silent in this regard because the fact is that such formal revocation was never attempted. When new lists were made up from the resurveys they were certified by the Secretary of the Interior without recital or reference to the former approved lists in the same townships. For illustration: No list was made up upon the resurvey of 1856 of the lands in township 18 N., R. 3 W., (the township here in question) until in 1866. Full copy thereof appears in this record (pp. 178-180). It contains no reference to any former list nor suggestion of revocation, or attempted revocation, of the former approved list, certified in 1853, embracing the land in this township as then made up from the original survey.

Similar lists are found at Rec. pp. 184, 186, 198, 215 and 217, and contain no reference to former lists or attempted revocation thereof. Undoubtedly, as between the Land Department at Washington and the U. S. Surveyors-General, communications were sent declaring that lists based upon resurveys were transmitted and received as *intended* to supersede and abrogate the former lists based upon the original surveys in the same townships, but this unilateral action was taken by the United States on its own motion and in the exercise of a power which the State could not control. She could only receive patents for such lands as the Department was willing to issue, and was without remedy to force the Department to do otherwise. Michigan had adopted the field-notes of survey; that election had been and is held conclusive upon her. The Federal Government, by its officers, insisted upon adopting the field-notes of subsequent surveys; ignoring the approved lists made up by the original surveys, which

remained unpatented, and, having done this arbitrarily, the State was without remedy to do otherwise than accept what she could obtain through the voluntary action of the Federal officials. All this is amplified in our original brief (pp. 144 *et seq.*), but on the facts as presented by this record, and the authorities cited in our brief, we submit, this erroneous view of the law thus indulged by the Federal officials could not defeat the lawful rights of the State. That the State again and again requested the issuance of patents upon the lands thus found in the original approved lists, but excluded in the subsequent lists made up upon the basis of resurveys, will appear by reference to pages 182-206 of the Record.

And, notwithstanding this *ex parte* action of the Department in thus arbitrarily attempting to hold the State bound by the field-notes of resurvey, this record discloses that lands were patented to the State on the basis of the original surveys and approved lists made up thereunder, long *after* the same townships had been resurveyed.

This appears from the Commissioner's letter of December 27, 1871, to the State Land Commissioner (Rec. 34), advising:

"SIR: In reply to your letter of the 13th inst. in regard to the swamp lands in township 31 north, range 8 west, Michigan, I have to say that it appears from our records that the lands selected as swamp in said township, according to the old survey, were approved by the Secretary of the Interior, Oct. 27, 1853, before the resurvey, and were, subsequently, on November 10, 1862, after the resurvey, patented to the State, according to the descriptions of the old survey.

"This office has always regarded such approval and patenting final, especially when the description, according to the old plat, identifies the land with a reasonable approach to accuracy."

B.

It is further urged against us that the U. S. Land Department refused in all cases to recognize two lists of lands, one made up from the original survey and the other from the resurveys in any township.

In support of this contention reference is made to the action of the Commissioner on June 18, 1864 (Rec. 173-174), holding that supplemental list "D" which had been submitted from the resurveys in the Detroit District could not be patented, because the townships embraced therein had been covered by the approved lists and patenting thereof under the original surveys. This list "D" and this action thereon appears to have been again followed by the Commissioner in 1877 (Rec. 201) and in 1887 (Rec. 207).

This original action of June 18, 1864, with respect to list "D" does not appear to have been taken with notice to the State, nor are any reasons therein assigned for this arbitrary conclusion. *But* this same list "D" came before the Department on the appeal of the State from the Commissioner's rejection of its claim to certain lands therein, in the case of *State of Michigan v. Pencers' Heirs*, 19 Land Decisions, p. 223, whereupon the Secretary of the Interior, October 9, 1894, decided that—

"Admitting that selections from the township were
"made and approved under the old surveys, such action
"on the part of the State did not debar it from making
"supplemental selections from that township, if the first
"selections did not embrace all the swamp lands which
"passed under the act.

"Again, if the field-notes of the old or imperfect survey
"failed to disclose the real nature of the land, and the
"more perfect resurvey, made after the passage of the
"swamp-land act and with reference thereto, shows the

“land to be in fact swamp, the State, relying on the Government surveys, is entitled to file its supplemental list, with assurances of approval.”

The fairness of this conclusion is too apparent to require comment. The principle there applied has equal application hereto, *because*, as shown above, the land involved in the case at bar was actually surveyed in 1839, and was found and reported to be swamp, and the resurvey thereof, made seventeen years later, and *after* the passage of the swamp-land grant, in returning the same as then dry should not preclude the State from receiving patent therefor upon the basis of the original survey. And in this connection we note the erroneous assumption of the opposing briefs, and indulged in the opinion of the Court below, that these resurveys absolutely superseded and abrogated the original survey. That is not true in fact nor in law. Both plats of survey have always been kept upon file, and necessarily the original survey could not thus be cancelled and held for naught, because the title to millions of acres of land sold by the United States to individuals and patented to the State under this and other grants rested thereon. The testimony of the Register of the land office in which the land here in suit lies (Rec. 49) shows that both plats are kept extant in his office, the original plat of survey being marked only with the word “Resurvey,” and (Rec. 53) that the plat of resurvey shows disposal thereon made only from the date of its receipt in the local office—June 3, 1858. Prior to that time land in many sections had been disposed of by the old survey.

C.

Stress is laid upon the fact that, in reporting the original list of swamp lands in this township in 1852, the surveyor

noted the letter "F" on this township, and explained the same in his certificate thereto (Rec. 153) by inserting that "the tracts reported by Judge Burt and Hiram Burnham "to be fraudulent are embraced in the list and marked "F." But it must be borne in mind that, with this list and this certificate before him, the Secretary of the Interior, on October 27, 1853, embraced this land in his approved list certified to the State, made up from this list of selections thus reported eighteen months preceding from the Surveyor-General. Why was this done? The Secretary had before him the report of Deputy-Surveyor Burt, alleging the survey of this township, with others, to be "bad throughout," for same was transmitted by the Surveyor-General in his annual report for 1849 (Rec. 89-96). But as early as 1850 (and as shown *supra*) the United States had brought suit against the deputy who made the original survey of this township and his bondsmen upon the distinct allegation that he had failed to make the survey, and had gone to trial upon the distinct plea and issue of performance, with resulting judgment in favor of the defendant. This constitutes the entire record, both *pro* and *con*, relating to the defective survey of this township. It must be assumed that upon this record the Secretary of the Interior exercised his judgment and determined that the State was entitled to receive the grant of swamp lands in this township by the return and field-notes of such original survey. No other conclusion can be indulged, because it is idle to assume that the United States Land Department was proceeding with eyes wide open to certify lands to the State under a survey alleged by its own records to be defective or fraudulent, and in the anticipation that it would thereafter be called upon to revise and change all of its work. In our original brief, at page 92 *et seq.*, we have fully discussed the facts and

submitted authorities to establish the finality of this action of the Secretary on this question of survey as involved in his then certification of this land to the State as swamp. The correctness of the Secretary's conclusion is made manifest by the resurvey, which disclosed the actual existence of the section lines and the swampy character of the land involved in pending suit.

D.

Attention is called to the fact that on the original certified list of 1853 appear erasures and notes showing that same has been superseded by a supplemental list made in 1866. How this mutilation of the record can affect the title of the State is not explained, but it must be borne in mind that none of these erasures and notes could have been made until after the resurvey of this township in 1856, for the facts on which it was attempted had no existence prior to such resurvey, nor could such mutilation at any time, or however done, destroy the rights of the State nor defeat the full legal effect of the act of the Secretary of the Interior in thus identifying this land in such approved list as part of the swamp grant to the State. That these marks were not intended to have any legal effect appears by the fact that the approved list made up in 1866 from the resurvey of this township (Rec. 175-178) contained like erasures. Similar erasures were also found in approved lists based upon resurveys at page 217 of this Record. And in respect to the Surveyor-General's lists submitted in 1852, of which copy appears in this Record (pp. 149, 153), it should be noted that such copy comes from the State land office where all the original records of the United States Surveyor-General's office were long since lodged, and it is more than probable

that such list was the original from which the list transmitted to the Department by the Surveyor-General in 1852 was made. The waving lines drawn through the township and range on all of these lists are made in pencil, and as it is found both on lists certified under the original surveys and under the resurveys it simply indicates that it has been done by some clerk in checking the tracts described thereon. It goes without saying that such mutilations of records cannot destroy or mutilate titles.

Polk's Lessee v. Wendell, 9 Cranch, 87, 97.

Bicknell v. Comstock, 113 U. S. 149, 156.

E.

Again, it is urged that the field-notes of survey gave no true index to the character of the country. Copious quotations are made from the reports of the United States Surveyors-General to sustain that conclusion. But it must be again remembered that these alleged fraudulent and defective surveys had been under examination and correction for eight years preceding the swamp-land grant. With full knowledge thereof the Secretary of the Interior offered to the State the option to take by the field-notes of these surveys or by new and independent proof. The State has been held bound by its selection to so take by the field-notes of survey. The only difficulty is that the United States has *ex parte* insisted upon the right to change defective surveys by new surveys and to compel the State to take the grant by such new surveys, thus attempting to ignore all prior surveys and identification of swamp lands thereunder, to the manifest detriment of the State, and without power on her part to resist. The consistent holding of the Department that the State was thus

bound by her original election is set forth at length in our original brief (p. 62 *et seq.*), and because the State is willing to stand by that election and asked to have the swamp grant patented to her by the field-notes of actual survey as then existing gave no warrant in law or morals for the subsequent attempt to force upon her new surveys, made years after the grant, and, in short, to wholly change the record on which her election was predicated. The State in this regard and by this election stands in harmony with the original theory on which the legislation for this swamp-land grant was initiated. For, as set forth at page 59 of our original brief, and as well-understood public history, the bill, as passed by the Senate, granted only such lands as were designated as swamp on the plats of survey. Under the advice of the United States Land Department, the provision was enlarged to admit evidence *aliunde*, and became in that form a law. But the whole tenor of the grant with respect to identification proceeds upon a theory harmonizing well with the original provision of the bill restricting same to the lands thus reported swamp by the official notes of survey. The State, having accepted such field-notes of survey as the basis for adjustment of the grant to her, cannot now be charged, nearly fifty years later, with bad faith in simply asking that lands actually *surveyed* and returned as swamp should be recognized as part of the grant.

F.

Stress is laid upon the letter of the State Land Commissioner (Rec. 189) of April 30, 1874, transmitting to the Commissioner of the General Land Office a supplemental list of lands in the Grand River District, in townships re-surveyed, as intended to supersede prior lists in the same

townships, and the argument is drawn therefrom that this was a recognition by the State Land Commissioner of the *fact* that such new lists based upon resurvey superseded the old. But it will be found that the State Land Commissioner was merely reciting in his letter the same descriptive heading given to this supplemental list as made up by the United States Surveyor-General, and which appears at page 175 of the Record. And in this connection it is important to note that in July, 1881, the Governor of the State requested patent on tracts included in the township here involved, based upon the original approval in 1853, thus demonstrating that the State officers did not so interpret the effect of the new lists as defeating the claim of the State under the old. (Rec. 203-204.)

These repeated refusals of the Department, shown *supra*, to patent to the State lands certified to the State as swamp by the original surveys left the State without remedy by any suit it could bring against the United States. At the inception of the grant her legislature had provided that no patent could issue from the State until the land had been patented to her by the United States, and the Court of Appeals in this case (Rec. 339) assumes that prohibition as still in force. But this is error, for in *State of Michigan v. Sparrow*, 89 Michigan, 263, the Supreme Court of the State expressly finds full authority in the State law to issue patents to swamp lands which have not been patented by the United States to the State. This construction of the State statute is controlling here. Thereunder the State, by her grantee, can thus obtain standing in court to assert her title.

G.

Opposing counsel quotes the letter from United States Surveyor-General Noble to the Governor of Michigan of

January 3, 1851 (Rec. 20), as authority for the contention that the Surveyor-General then notified the State that there was no authority "for designating a portion of the swamp lands from the notes of the surveyor returned to this office, and a portion by a resurvey." The manner in which this quotation is thus used is misleading. Reference to the latter will show that the United States Surveyor-General informed the Governor as to the manner in which the State could make her *original* selection—*i. e.*, either to take *wholly* by the field-notes of the public land survey or *wholly* by new and independent proof to be submitted by the State. The latter has no relation whatever to the question of the resurveys then in progress correcting former surveys, and its whole tenor repudiates the possibility of such a matter being in the mind of the writer.

II.

It is urged that the State failed to protest against the reoffering of this land by the United States at the public sale in 1869, following which the defendant in error and his grantors purchased from the Government. It is only necessary to reply that the claim and title of the State was matter of public record, of which such purchasers were bound to take notice. Such protest was not necessary to protect that right, nor does its absence cast the legal title upon the Government's grantee. The case in this regard is within the rule well illustrated by the decision in *Goundie v. Northampton Water Co.*, 7 Barr, 233, which holds that after registry of a deed the owner need not give notice of his title at sheriff's sale of another title. And in *Rice v. Dewey*, 54 Barb. 455, 470, which declares that—

“No case can be found holding that a mortgagee, whose mortgage was duly recorded, lost any right by neglecting to give personal notice of his mortgage to a purchaser from the mortgagor.”

I.

At pp. 54, 55, counsel quote from letter of the State Land Commissioner to the Governor, dated April 5, 1859 (R. 221), and the annual report of such Commissioner for 1860 (R. 226-228), to show apparent acquiescence on his part in the plan of adjustment of the grant by the resurveys, and ignoring the certifications and approvals made to the State by the original surveys. But counsel fail to quote the following pertinent observation in such letter, viz :

“And, under all the circumstances in the case, I don’t know why they cannot give us the patents under the old lists, as approved, with the same propriety that they have the others.

“The erroneous surveys were known to the Department before these patents were made, and must have come to the knowledge of the Department about the time Congress made the law granting the swamp lands to the State.”

And the equally pertinent conclusion of the State Land Commissioner’s report for 1860, *supra*, where, in speaking on the same subject, he concludes thus :

“No patents have been received since January, 1859, and I think, therefore, we have reason to fear that the Department at Washington is withholding those about which there is no conflict, as a lever with which to compel the adjustment of the remainder in accordance with their proposition.”

Does this argue *acquiescence* as claimed by counsel?

J.

At pp. 56-61 counsel quote from annual reports of the State Land Commissioner to show that the swamp grant as then claimed by him, had been practically all conveyed to the State, except some 35,000 acres in Cheboygan County. This matter is fully discussed and its error exposed in our original brief, pp. 137 *et seq.* And the conclusion of counsel (61) that the State had assented to an adjustment of the grant upon the basis of the resurveys is fully answered in our original brief (pp. 125-141).

K.

At pp. 61-62 counsel refer to certain exhibits, being letters from the General Land Office to the State officers advising of certain corrections in approved swamp lists, deducing therefrom the conclusion that such corrections were matters of common practice. But examination of these exhibits will show that tracts so expunged were lands either disposed of by the United States *prior* to the swamp grant, or otherwise than reserved, or mere clerical corrections in descriptions of tracts by substituting correct for erroneous or non-existing descriptions. All of this does *not* prove that by such process of erasure merely the State's right could be thus destroyed with respect to land *not* disposed of prior to the swamp grant, nor reserved therefrom or where no clerical error of description is found. Lists of lands previously sold or reserved would convey no title to the State, because the grant did not embrace them, and their erasure could not affect the State's title any more than their original and erroneous inclusion in the approved lists; and correction of clerical errors of description is manifestly not authority against us here.

XIII.

Much argument is indulged to show that the Secretary of the Interior has and exercises the power to revoke approval of swamp-land lists upon proven fraud thereon or in the evidence on which they are based. But we have shown *supra* that the original survey of 1839 in respect to this land was not fraudulent; that the lines were in fact run and the character of the land truthfully returned thereby; that the United States was defeated on trial of the issue of fact on this question in the suit brought against the original surveyor; that the resurvey of 1856 reports swamps on the lines affecting these lands where swamp land was reported by the original survey and that many of the original section and quarter-section corner posts in and around the sections embracing the lands in suit were found correctly located by the resurvey. *Hence* the power of revocation assumed to exist against proven fraud cannot here be called into exercise, because there *was* no fraud in the original survey embracing this land. Surely the mere *ipse dixit* of the Department *assuming* fraud cannot defeat the title of the State against all the evidences furnished by this record establishing the contrary with respect to the tracts here in controversy.

Furthermore, the Oregon cases decided in recent years by the Secretary of the Interior and cited with chief reliance against us are not applicable, (1) because active participation of the State's agent in the identification of the swamp lands appears, and as Oregon did not take the grant by the field-notes of survey such connection of the State agent therewith presents a case far different from the one at bar. In these and all the Executive decisions thus cited (pp. 76-82) it affirmatively appears that fraud in the return of the survey was established under oath or

manifest mistake appeared, as in certifying land otherwise disposed of or non-existing. But in all the cases thus cited formal revocation of the approved list was made, which was never done in respect to the 1853 approved list which embraced the lands here in suit. Nor has the State of Michigan ever been formally notified that the original approved list of 1853 has been rejected or the approval thereof revoked. That list is of record in the United States Land Department to-day *uncancelled*.

XIV.

THE CONFIRMATORY ACT OF MARCH 3, 1857.

The application of the Act of 1857 to the lands here involved is demonstrated both on reason and authority by our original brief (pp. 105-113). It remains only necessary to correct the misapprehensions indulged by opposing counsel.

1. It is assumed (pp. 94-96) that certain cited decisions of the Department (*State of Arkansas*, 8 Land Decisions 387, and *State of Michigan*, 7 *ib.* 514), hold the Act of 1857 inoperative in cases similar to the one at bar. This is plain error. Those cases hold that where, *before* the Act of 1857, the selection had been rejected, the Act did not apply. But in present case the selections had not been so rejected. It was not until in 1858 that the United States Surveyor-General forwarded his list of selections based upon the resurvey of this township. *Prior* to that time the approved list of 1853 stood unimpeached and without *any* adverse action. The Secretary of the Interior did not act upon the supplemental list thus forwarded in 1858, until in 1866, when he approved a new list, made up therefrom, excluding the tracts here in suit. This is the *only* action

wherefrom rejection of the 1853 approved selections can be even inferred. No revocation of the original list of 1853, which includes these lands, was then or since attempted. Commissioner Hendricks had in 1858 (*supra*, Rec. 31) distinctly advised the State that *formal* revocation of the original approved lists would be made as and when new lists were made up based upon the resurveys with respect to tracts so originally approved but not returned as swamp by such resurveys. *If* this had been attempted, the State's affirmative action and protest could have been expected. *Until* this was done she was not required to act, for, until such annulment of her title was thus formally attempted, she was not required to speak.

2. The construction given the Act of 1857 by Secretary Thompson in 1858 (1 Lester, 563), cited and relied upon against us, is in harmony with the rulings of the Department in the Arkansas and Michigan cases *supra*, and the facts of present record disclose a case *clearly* confirmed by the Act of 1857 under the decision of Secretary Thompson, *i. e.*, a list of approved selections *not* rejected nor in any manner disturbed at time of the passage of the confirmatory act.

3. In *State of Michigan v. Powers' Heirs* (19 Land Decisions, 223-225), Mr. Secretary Smith, on October 9, 1894, gave like broad interpretation to the Act of 1857. In that case it appeared that the original *list* had been approved and patented, but in February, 1857, a new or supplemental list was transmitted by the U. S. Surveyor-General of *additional* lands shown by the *resurvey* to be swamp. This latter list was rejected by the General Land Office on June 18, 1864. On these facts the Secretary held :

" If the State's selection was made prior to March 3, 1857, and if at that time the land was vacant and unap-

“appropriated, and not interfered with by an actual settlement under existing law, the selection is confirmed.”

The Act of March 3, 1857, is purely remedial; hence its operation is co-extensive with the mischief. No limitations or exceptions can be made thereto save such as are expressly named in the act (1) that the lands are vacant, and (2) not claimed by actual settlers under any existing law. The proof herein shows that these statutory exceptions did not exist with respect to these lands (Rec. 48), and hence they necessarily fell within the confirmation made thereby.

XV.

THE CLAIM OF ESTOPPEL AGAINST THE STATE.

It is alleged that the State is estopped by its “conduct,” but upon the facts in this record it is clear that the action of the State has been wholly negative. She has simply kept silent. With her title of record and notice thereof thus open to all the world, it cannot be affirmed that the mere silence of the State creates an estoppel against her here. This point is fully discussed in our original brief (pages 143-161), and the controlling decisions of this Court are herein cited at length which demonstrate that the State’s silence will not create an estoppel. The doctrine is also well supported by the following cases:

Sulphine v. Dunbar, 55 Miss. 255, wherein the syllabus (fully supported by the text), concisely states the point decided thus:

“Where a tract of land is sold under a deed of trust covering the whole, but given by a part owner, the owner of another interest in the same, residing upon the place and making no objection to the sale and no claim to the land at

“ the time of the sale, is not by such conduct estopped
 “ from afterwards asserting his title against the purchaser,
 “ if, at the time of the sale, his title is a matter of record,
 “ and he does nothing to mislead the purchaser into buy-
 “ ing the land, although remaining silent as to his title.”

In *Neal v. Gregory et al.*, 19 Florida, 356-371, it is held:

“ It is also true that when the actual state of the title
 “ can be readily ascertained by reference to the record,
 “ and the purchaser neglects to avail himself of the in-
 “ formation which a simple examination of the record af-
 “ fords, silence unaccompanied by fraud will not operate
 “ as a peremptory estoppel. *Bigelow v. Topliff*, 25 Ver-
 “ mont, 253 ; *Carter v. Champion*, 8 Conn. 554 ; *Gray v.*
 “ *Bartlett*, 20 Pick. 183.”

And to the same effect are—

Kingman v. Graham, 51 Wis. 232.

Knouff v. Thompson, 16 Pa. St. 357.

Rice v. Dewey, 54 Barb. 455.

May v. Cartwright, 20 Ark. 407.

The case of *State of Michigan v. Jackson, Lansing and Saginaw Railroad Company* (16 C. C. A. 345, 69 Fed. Rep. 116), cited at length against us, was decided by the same Court whose decision in pending case is here under review. And the conclusion therein that the State is estopped is sought to be supported by the citation of like decision in *State of Michigan v. R.R. Co.*, 89 *Michigan*, 481. In both of these cases, however, the relevant and controlling fact appears (wholly differing therein from the case at bar) that the land had been certified to the State for railroad purposes ; such certification had been *accepted* by the State ; the State had taxed the lands in the hands of the railroad company and its grantees, and thus by matter of *record* had fairly become estopped from asserting any adversary title under the prior swamp-land grant.

In an elaborate foot-note to the case reported in 16 C. C. A., *supra*, the authorities upon the question of estoppel against the United States and the States are fully reviewed. Whilst by no means in harmony, we believe the weight of authority will be found against the doctrine asserted by the Circuit Court of Appeals. In the light of these authorities and upon original reasoning, we submit, the true line of demarkation is that the State may be estopped by affirmative Acts of her Legislature, or of her officers acting within the scope of their power. *But* that mere neglect or silence on the part of the State or her officers cannot, upon the ground of laches or conduct, create an affirmative right by way of estoppel against the State. It is manifest here that the State Land Commissioner could not bind the State by acceptance of the *ex parte* ruling of the U. S. Land Department holding that the swamp grant must be adjusted in whole or in part upon the basis of the resurveys; nor, we submit, is there any evidence in this record from which it can be fairly inferred that such officer undertook to exercise any such excessive and non-existing power. No statute of limitation can run against the sovereign, except by its express consent. No laches can be imputed to the Government. *United States v. Dalles Military Road Company*, 140 U. S., pp. 599-632, and cases cited therein.

This sound doctrine, so essential to the welfare of the State, has, we submit, complete application here. All the evidence in the case demonstrates that this land was originally *rightfully* approved to the State as swamp. Her selection thereof stands confirmed under the Act of March 3, 1857, *supra*, and the subsequent mistaken action of a Federal official in ignoring her title, as thus made and confirmed, and in issuing the patents relied upon by the defendant in error, cannot be upheld against the title of the State upon the ground that such conduct, which the

State could not control, lays foundation for any just claim of estoppel against the State by her silence, when her right and title was thus made of public record and the confirmatory Act of March 3, 1857, stood upon the statute book as a *law* whereby all men were bound.

Nor are counsel's assertions correct which ascribe to the State active consent and acquiescence in the adoption of new and substitute lists prepared upon the basis of the resurveys. None of the proof offered and set forth at length in the opposing briefs sustains such conclusion of fact. *Contra*, the Governor was in 1855 simply asked to *suspend* sales of land certified to the State as swamp pending adjustment of the differences caused by the resurveys (Rec. 171). This was followed by Commissioner Hendrick's letter in 1858 (Rec. 31), requesting the State's *election* to receive the grant in townships where the lands certified had not been patented "upon the evidences of "the resurveys." The State did not reply. The State Land Commissioner in some of his annual reports did note the fact that the U. S. Land Department proposed to adjust the grant on the basis of the resurveys, but nowhere in the record does it appear that the Legislature or even the Governor took affirmative action upon any such basis or committed the State by any attempted consent thereto. If estoppel can be maintained against the State on this record, it cannot be predicated on affirmative acts by the Legislature or any officer of the State having authority to bind her in so grave a matter.

Respectfully submitted.

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